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IN THE

Supreme Court of the United States

October Term, 1969

No. 433

P. S. SEYMOUR-HEATH,

Petitioner,

vs.

UNITED STATES OF AMERICA, AMERICAN PUMICE COMPANY and GEORGE T. GOGGIN, Trustee in Bankruptcy for Trans-Pacific Corporation and Communications Equipment Corporation,

Respondents.

Response to Petition for Certiorari to United States Court of Appeals for the Ninth Circuit.

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Response to Petition for Certiorari to United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

George T. Goggin, the duly appointed, qualified and acting trustee for Trans-Pacific Corporation and Communications Equipment Corporation, Bankrupts, pending in administration in the United States District Court, Central District of California at Los Angeles before Referee James E. Moriarty, responds to the Petition of P. S. Seymour-Heath (hereinafter referred to as "Heath") and respectfully contends that said Petition should be denied.

History of Bankruptcy Proceedings Filed in United States District Court, Then Southern District (Now Central) of California in 1946.

Heath was the principal of four corporations:

Trans-Pacific Corporation, No. 44,604-WMB

Communications Equipment Corporation, No. 44,607-WMB

Columbia Stamping and Manufacturing Corporation, No. 44,605-WMB

Neu-Bart Stamping and Manufacturing Corporation, No. 44,606-WMB

Neu-Bart Stamping and Manufacturing Corporation has been concluded and closed with payment of allowed claims. Columbia Stamping & Manufacturing Corporation closed with some, but not all claims were paid. Approximately $20,000 of residual funds remained which was dedicated to and eventually used in the defense of the condemnation actions as set forth hereinafter.

In bankruptcy proceedings the trustee contended that the capital stock of a California corporation known as American Pumice Company (hereinafter referred to as "American Pumice") was wholly owned by Trans-Pacific Corporation and that he was entitled thereto.

The trustee instituted proceedings contending Heath had no right, title or interest in and to said stock.

Compromise of October 20, 1959.

A compromise was entered into and approved by the Referee, Heath releasing said stock to the trustee.

This compromise came to the attention of the United States Court of Appeals for the Ninth Circuit in the

case of *P. S. Seymour-Heath vs. George T. Goggin, trustee,* 389 F. 2d 327, January 10, 1968. The compromise is set forth (Note 1, pages 328, 329 and 330). The decision interpreted the compromise and held the trustee's proposed settlement with the Government with respect to the condemnation award to American Pumice could not be made because Heath had not agreed thereto in writing. Heath, as appellant, in the said appeal was represented by his attorney Morris Lavine.

Attention is called to the fact that in said decision at page 331 (Note 3.) reference is made to the allowance by the Referee of extensive tax and renegotiation claims in the said two remaining bankruptcy proceedings. The trustee had objected to these claims, extensive hearings were had thereon, Order was made thereon by the Referee as indicated in said Note. The trustee and his attorneys concluded the Order was proper and did not file a Petition for Review. Heath was permitted by the Referee to file a Petition for Review, which was heard and affirmed by the District Judge. Heath then appealed to the United States Circuit Court of Appeals for the Ninth Circuit, represented therein by Morris Lavine and the Orders of the Referee and District Judge were affirmed in the case of *P. S. Seymour-Heath vs. United States of America and George T. Goggin, trustee,* 404 F.2d 59, November 5, 1968. There were also additional claims (Note 4.) which had been filed and asserted in said two corporation proceedings.

In the Petition for Certiorari Heath places reliance upon said decision, referred to hereinabove in 389 F. 2d 327.

Prior Determination of Rights and Status of Heath—July 26, 1965.

Attention is called to and we quote a pertinent portion of said decision (389 F. 2d at page 330):

> "On July 26, 1965, a conference was held in the chambers of the Referee, at which the trustee, his counsel, attorneys Dolle and Hansen, and Heath, were present. On July 30, 1965 an Order was made as follows:
>
> '1. That special counsel proposed (by Heath) to be employed in said condemnation action in substitution of Judge Victor R. Hansen and Hodge L. Dolle be denied;
>
> 2. That there be no appeal upon behalf of the trustee in said action;
>
> 3. If the Government appealed, Judge Victor R. Hansen and Hodge L. Dolle as special counsel to prosecute the defense thereof and represent the trustee therein;
>
> 4. If P. S. Seymour-Heath desires to proceed with an appeal from the award of the U. S. District Court, he may do so at his own expense and upon the posting of an acceptable surety bond in the amount of $225,000 with this court to protect these estates from any diminution from the award as it presently stands.'
>
> That Order has long since become final. Heath did not post a bond or provide for an appeal and the appeal of American Pumice has lapsed."

Messrs. Dolle and Hansen recommended against an appeal from the condemnation award, giving their opinion, that it would not be successful, that the trustee re-

lied on their views and advice and that his counsel agreed thereto. It was found that the combined assets of the estates were less than $2,500. After submission of the condemnation case and before the decision, Heath stated to counsel for the trustee, it was his opinion the condemnation judgment would be many times that which was thereafter rendered.

The two cases pertaining to the condemnation actions are:

United States of America v. "Land", Civil Nos. 311 ND, and 3472-PH. The lengthy decision rendered by United States District Judge Peirson M. Hall, November 24, 1964, appears in 236 F. Supp. 44. Hansen and Dolle represented American Pumice and Heath was personally present throughout the trial.

The short affirmance of said decision appears in *United States of America v. American Pumice Co.*, 404 F. 2d 336, November 15, 1968, and recites as one of the appearances: "P. S. Seymour-Heath, Pro Per."

Heath ignores or misconceives the practical work out of the stipulation and order of October 20, 1959. He has assumed and stated he was personally entitled to the award after claims and expenses were paid, and contends that he did not have an opportunity to put on "his case". Several places in the Petition for Certiorari there is reference to the value as contended by Heath—

> "Thus had there been before the Court of Appeals an argument and a presentation of Heath's case, the same decision of the Court of Appeals would have resulted in an increase in the award by some $1.3 Million to $2 Million." (Page 7).

This is somewhat of an exaggeration. The remaining residue was for American Pumice in trust, with the use of the condemnation recovery, first to payment of expenses of the condemnation actions, payment of expenses of administration in said two bankrupt estate and payment of claims. In addition, substantial claims and charges are now being made by the Director of Internal Revenue and by California Franchise Tax Board claiming that taxes must be paid by American Pumice based upon the recovery of the award as against the cost of the pumice claims to American Pumice of approximately $30,000, which cost valuation is somewhat in line with the contentions of the Government at the trial before Judge Hall. The net result is said claims will not be fully paid and there will be no residue of the condemnation funds to pass to American Pumice.

Heath quarrels with the condemnation award with the further statement at page 11:

> "In and by the record in this case and the position of said Heath, the actual value of the property taken and the damages suffered by reason of the taking amounted to a total of not less than $1,300,000 plus interest at six percent per annum, which said interest amounted to approximately $1,560,000, making a grand total in excess of $2,860,000. There was no evidence contrary to the experts on value and the lowest expert appraisal was $1,300,000 so that the issue became one of law. This shows the alarming inadequacy of the judgment rendered by the trial court—(Heath) made various efforts, both in the trial court and in the Court of Appeals, in pro. per., for the purpose of bringing this matter to the attention of the Court of Appeals."

Beyond any doubt, Heath, when the judgment was announced by Judge Hall, was disappointed with the award. The Government was likewise disappointed and filed an appeal to bring about a reduction thereof.

Pursuant to the said Order of June 30, 1965 the appeal of the United States Government was defended upon behalf of American Pumice by Hansen and Dolle and they were successful in defeating the appeal of the Government with the result there was no reduction in the condemnation award.

The Petition for Certiorari—Recall of Mandate.

The Petition for Certiorari sets forth in II, page 3, that a review is sought from the Order of the United States Court of Appeals for the Ninth Circuit, dated May 8, 1969 denying Heath's motion to recall the mandate (decision of said Court appearing in 404 F. 2d 336). Then follows the statement:

> "Petitioner does not seek to overturn this Opinion but seeks to recall the mandate of the Court in order that the balance of the case may be heard and in particular the case of Heath."

Heath seeks somewhat of a "scatter gun" type of Order or Orders. He does not seek to overturn the affirmance of the judgment in the condemnation actions. In the first instance he seeks an Order recalling the mandate and if the mandate is recalled, it is his desire and intention that the "balance" of the case may be heard, and in particular, the case of Heath. Heath never had a "case" as such. Heath's position and "case" and rights as per the Order of October 20, 1959, only pertain to such residue as would revert to American Pumice.

Heath envisions that by such a retrial he can bring about before Judge Hall an increase in the condemnation award. If there is such a proceeding, it would not be a unilateral presentation by Heath, but the United States Government would be a party thereto with the possibility that it might bring about a diminution of the award.

It is apparent from the Petition for Certiorari that Heath places great reliance upon the decision of the United States Circuit Court of Appeals for the Ninth Circuit (389 F. 2d 327) and states:

> "At that time the Court squarely held the rights under the October 20, 1959 compromise Order could not be defeated."

In fact it did so determine with respect only to the fact that the compromise could not be made without Heath's written approval. The decision also noted that Heath had not appealed and that the time for appeal had lapsed. The said decision did not enlarge his rights otherwise or in any other manner.

Receipt and Disbursement of Condemnation Award in Subsequent Bankruptcy Administration.

After the decision affirming the condemnation award became final the Government paid to American Pumice —George T. Goggin, trustee, the amount of $368,839.66. The increased amount being the addition of interest upon the condemnation award.

The following are the additional matters of administration in the two bankruptcy proceedings:

1. Application for fees was filed by Hansen and Dolle for services rendered to American Pumice in the condemnation actions. Hearing was had thereon on no-

tice to creditors and parties in interest, including Heath, and an Order was made allowing the same in the amount of $85,000. Payment was made thereof by the trustee.

2. In compliance with the said Order of October 20, 1959, the trustee filed an application and Order to Show Cause was issued by Referee James E. Moriarty (who incidently was the fifth Referee to whom these long pending cases were referred) requiring Paul R. Splane, Ralph A. McClure, J. J. Sugarman Company, as well as Heath, to appear before the Referee and show their rights to payment from the said award. Hearing was had thereon and the Referee made Orders for the payment to: Paul R. Splane of $12,500; Ralph A. McClure, auditor, of $9,300; N. N. Sugarman (successor of J. J. Sugarman Company) of $5,000. At the said hearing before the Referee, Heath testified that the $5,000 should be paid to him. His contention was denied by the Referee and the $5,000 was paid to N. N. Sugarman.

Said payments were made prior to the filing of the present Petition for Certiorari. The above Orders directing the said disbursements are final and no review or reviews were filed thereto.

Heath filed a response to the Order to Show Cause and asserted a demand for payment to him (personally) from the condemnation award for services rendered by him throughout the proceeding in the sum of $100,000. This claim has been contested by the trustee and no Order has been made either allowing or disallowing the said claim.

If the mandate is set aside and the desire of Heath is granted—"in order he may present his case"—and a

further hearing brings about a reduction of the award, the trustee will be confronted with a most perplexing situation in his administration of the two bankrupt estates.

As stated hereinabove, there was no appeal to this Honorable Court from the affirmance of the condemnation award so made by the United States Court of Appeals for the Ninth Circuit by its decision of November 15, 1968. After the hearing on the appeal however, Heath made a motion that the ruling of the said appellate court be deferred. This motion was denied. The time within which an appeal to this Honorable Court could be undertaken has lapsed.

Heath made a motion to said appellate court to recall the mandate. That motion was likewise denied. Thereafter the present Petition for Certiorari was filed.

At the inception of the trial before Judge Hall, had Heath made a motion he be recognized as party defendant, such a motion would no doubt, have been denied. The true and only defendant was the owner of the condemned property—American Pumice. It was represented by Victor R. Hansen and Hodge L. Dolle, who had been selected in the first instance, at the request of Heath. Heath was no more or less than claimant to the stock or a stockholder of American Pumice and not a principal in said condemnation actions.

Authorities Cited in Petition for Certiorari.

It is contended in the Petition for Certiorari that the refusal of the United States Court of Appeals for the Ninth Circuit to recall the mandate or otherwise recognize rights of Heath is in conflict with opinions of this Honorable Court and of Circuit Courts of Appeal

in related areas. There is cited therein the following two recent cases of the United States Supreme Court.

Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964);

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Also a third case, the very recent "void garnishment proceeding case" determined in *Sniadach v. Family Finance Corporation of Bay View,* 23 L. Ed. 2d 349 (June 9, 1969).

The determination in these cases have no relationship, either on a factual or legal basis to the present matter here involved.

Authorities Cited in Response to the Petition for Certiorari.

Gradsky, et al. v. United States of America, 376 F. 2d 993 (5th Cir., May 2, 1967).

The prosecution in this case arose from a violation of the Anti-Trust provisions of the Securities Act. Convicted defendants appealed the judgment. The Circuit Court affirmed judgment in part and set aside in part and remanded. Certiorari was granted with respect to certain defendants. The Supreme Court affirmed certain convictions, reversed others and remanded the case. The decision indicates the usual issuance of a mandate means litigation has come to an end, but the court may recall its mandate to prevent injustice.

Anderson v. Knox, 300 F. 2d 296 (Circuit Court Hawaii, 1962).

Where there was a contended payment after judgment which should be credited thereon, was a matter to be determined by the trial court after return of mandate and should not be litigated by Court of Appeals or delay effective date of mandate.

Fisher v. United States, 229 F. 2d 860 (9th Cir., 1956).

In a criminal case after affirmance, convicted defendant filed motion to recall mandate before leave to petition for rehearing. The finding was there were no valid grounds stated and the motion was denied.

Hazel-Atlas Glass Company v. Hartford-Empire Co., 322 U.S. 238, 88 L. Ed. 1250 (Opinion delivered by Justice Black, 1944).

The United States Supreme Court has determined a mandate can be recalled where a showing is made of discovery of fraud. But that the said power should be cautiously exercised.

Briggs v. Pennsylvania R. Co., 154 F. 2d 21 (2nd Cir. 1947).

The mandate may also be recalled where the decision did not properly conform to an interest provision set forth in the judgment. However, this case also cautions such recall of a mandate will only be on exceptional circumstances as where there has been a fraud on the court.

On issuance of Writ of Certiorari to United States Court of Appeals for the Second Circuit, the decision

was affirmed in *Briggs v. Pennsylvania R. Co.,* 334 U.S. 304, 92 L. Ed. 1403 (Opinion delivered by Justice Jackson, 1948) with the following statement:

> "While power to act on its mandate after the term expired survives to protect the integrity of the court's own process (citing Hazel-Atlas Glass Co. v. Hartford-Empire, supra) has not been held to survive for the convenience of litigants (citing Fairmont Creamery v. State of Minnesota, 275 U.S. 70, 72 L. Ed. 168)."

Kansas City Southern Railway Company v. Guardian Trust Company, 281 U.S. 10, 74 L. Ed. 659 (Opinion delivered by Justice Butler, 1930).

This case interprets the effect of the mandate awarding costs as between the parties and holds the provisions cannot be varied by the District Court by allowing additional attorney fees and other expenses.

The Petition for Certiorari sets forth on page 11 the following recitation.

> "Heath made various efforts, both in the trial court and the Court of Appeals, in 'pro. per.' for the purpose of bringing this matter to the attention of the Court of Appeals".

This is somewhat of an understatement and the Petition for Certiorari provides no further information thereon. Therefore, we have set forth in the Appendix attached hereto reference to the said efforts with a notation thereon of the Orders denying the various elements of relief which Heath sought.

Supreme Court Rules—Rule 19b:

> "Where a court of appeals has—so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

It is respectfully contended that there has not been such a departure either by the Ninth Circuit Court of Appeals or by the trial Judge as would call upon this Court for an exercise of its right of supervision.

Respectfully submitted,

THOMAS S. TOBIN,
(of CRAIG, WELLER & LAUGHARN),
Attorneys for Respondents.

APPENDIX.

Motions Heretofore Made by P. S. Seymour-Heath and Orders Pertaining to Motions to the United States Court of Appeals for the Ninth Circuit in United States of America vs. American Pumice Company, No. 20,290.

1. Order on Motion before Barnes, Jertberg and Merrill, Circuit Judges, January 3, 1966:

> "Motion for order to recognize appellants or intervenors rights and for permission to file briefs and the opposition thereto were duly submitted to the Court on January 3rd, 1966. Upon consideration thereof and good cause appearing therefor IT IS ORDERED that said motions be, and the same hereby are denied for lack of jurisdiction."

2. Order before Barnes, Jertberg and Merrill, Circuit Judges, March 2, 1966:

> "The petition for rehearing or reconsideration of motion for permission to intervene and file briefs is denied."

3. Order before, Barnes, Jertberg and Merrill, Circuit Judges, March 22, 1966:

> "Petitioner P. S. Seymour-Heath's motion to instruct the District Judge to hear a motion to intervene is denied."

4. Order before Chambers, Merrill and Koelsch, Circuit Judges, October 24, 1966:

> "Absent a request in the district court file that this court remand the case, the motion to remand is denied without prejudice. See Smith and Corey vs. United States, 9 Cir., 294 F.2d 771."

5. Order on Motion before, Barnes, Duniway and Ely, CJJ, November 13, 1968:

"1. The petition of P. S. Seymour-Heath for a delay of the decision in this matter is denied.

2. The motion of P. S. Seymour-Heath for an order to remand this action to the district court for purposes of intervention is denied."

6. Order before Barnes, Duniway and Ely, Circuit Judges, May 8, 1969:

"The motion to recall mandate, filed herein on April 24, 1969 is denied."

BEFORE UNITED STATES DISTRICT JUDGE PEIRSON M. HALL

Motion of Heath, originally set for February 28, 1966 —heard March 7, 1966 (after appeal)

Motion to intervene (Coram Nobis) denied by said Judge March 8, 1966—notation Clerk to send copy to Ninth Circuit.